

**LELEK BIN DRAHMAN v.
PUBLIC PROSECUTOR**

[F.C. (Azmi L.P., Ismail Khan C.J. and Raja Azlan Shah J.)

March 12, 1972]

[Kuching — Federal Court Criminal Appeal No. 28 of 1972]

Criminal Law and Procedure — Charge of murder — Defence of accident — Report of handwriting expert on cautioned statement — Onus of proof — Proper direction to be given.

This was an appeal against the conviction of the appellant for murder. One of the grounds of the appeal was that the learned trial judge had erred in his direction on the onus of proof placed on the accused on a defence of accident. The other ground of appeal was that the trial judge should have directed the assessors that it was not safe to rely on the confession contained in the cautioned statement in view of the report of the handwriting expert.

Held, dismissing the appeal: (1) the learned judge in his direction had indicated to the assessors that in cases where the defence of accident is raised the burden is always on the prosecution to disprove the element of accident; and therefore there was no misdirection on the onus of proof:

(2) the assessment of this question would involve also the assessment of the evidence of two police officers (who were present when the cautioned statement was signed) who were never cross-examined on the point. In the circumstances this ground of appeal should fail.

Case referred to:-

(1) *Looi Wooi Saik v. Public Prosecutor* [1962] M.L.J. 337.

FEDERAL COURT.

Leonard Linggi Jugah for the appellant.

Denis Ong for the respondent.

Azmi L.P.: The appellant was convicted of murder and sentenced to death. The two assessors sitting with the learned judge returned a unanimous verdict, and the learned judge expressed agreement with it.

The appellant now appeals to this court against that judgment.

The facts of the case for the prosecution would appear to show that on the day of the incident at about 5.30 p.m. the appellant, a border scout, carrying a loaded shotgun issued to him by the police, entered the deceased's shop. The deceased was having dinner then at the rear of the premises. The appellant called him out and when the deceased appeared, the appellant fired a shot into the deceased's stomach, and then turned his attention to deceased's wife who then ran up to the first floor of the premises. According to her the appellant fired another shot in her direction.

There is also evidence by other witnesses corroborating the shooting of the deceased by the appellant. Postmortem examination showed that the deceased died of shock and haemorrhage following gunshot wounds through the abdomen lacerating the small and large intestines, kidney and the omentum. The blackening and burning round the entry wounds would appear to indicate that the shot was fired from within a few feet from the deceased. One pellet was recovered from inside the body near the right kidney. The medical opinion was that death must have followed almost immediately after the infliction of the injuries.

A P. C. Nahar immediately after receiving the information by telephone of the incident rushed to the scene, about a quarter mile from the police station, and on arrival at the scene saw the appellant in front of the deceased's shop. He was carrying a gun in his hand and had a belt of cartridges round his body. On demand by the P.C. the appellant surrendered both the gun and the belt of cartridges to the P.C. He was taken to the police station. Investigations started soon after under the direction of ASP Lawrence Foo.

ASP Lawrence Foo at about 10 p.m. on the same evening took the following cautioned statement from the appellant with the assistance of Cpl. Tuah as interpreter:—

C "On 7.9.70 at about 1730 hours I passed by Lim & Co. at Lundu Bazaar. The towkey whom I only know him as Lim told me that when I resign from Border Scout many Chinese will kill me.

On hearing this I returned to my house took my shotgun and cartridges with me and returned to the shophouse. While in the shop loaded my shotgun with a 12 bore cartridge aimed at the towkey's stomach and shot him.

(Signed) Lelek
7.9.70."

D The appellant gave evidence on oath. His version of the incident was as follows:—

"While I was walking to town I loaded my gun. It was my habit to do so. Lundu was at that time a security area. I continued walking along the five-foot way. I saw Lim at the doorstep. I held my gun in my right hand. I did not pay attention to Lim. Suddenly Lim grapped hold of my gun. I was surprised. I told him don't grip it is loaded. Lim said I was lying. He pulled the gun at one end. I also pulled. He pulled back. My finger was caught in the trigger. Lim pulled me into the shop. One of my foot was about 2 feet inside the shop. The other foot was on the doorstep. I followed him as I was afraid he would snatch the gun from me. I regret to see him being shot. I looked at Lim. I went to the road. I was afraid people might assault me. I lost my mind when I saw Lim was hit by the gun."

F He denied firing at the shop. He admitted firing one shot in the presence of P. C. Nahar. He said he was assaulted by a Chinese and fell down. Many people were crowding him. P. C. Nahar then took him to the police station. He then went on to say:—

G "After I fell down my giddiness became more serious. I became drunk. At first I was giddy. After I fell down the giddiness became worse. I was placed in cell in police station."

H He then referred to the alleged statement. He denied saying anything to ASP Lawrence Foo. He also denied signing the alleged cautioned statement or that the signature on it was his. In support of this contention the defence produced a written opinion of a handwriting expert who was provided with specimens of appellant's signature executed on 19 pieces of paper and those of his executed previous to his arrest on his paysheets and also his signature on the cautioned statement. The expert expressed the opinion that although he did not find significant differences which definitely point to different authorship between the signatures and dates on the cautioned statement and the signatures and handwriting on the four salary receipts, the evidence is insufficient to prove that the signatures and dates on the cautioned statement and the signatures and handwriting on the four salary

receipts were signed and written by the same person. In reference to the signatures on the 19 pieces of paper, he considered that they did not represent normal and natural signatures and handwriting of the writer.

Before us the summing-up was attacked on several grounds. One was as follows:—

"There was no evidence of intention adduced at the trial and it was the learned trial judge's duty to direct the assessors as to the need for and presence of it and this he omitted to do."

Counsel referred us to the summing-up where the learned trial judge dealt with the question of intention in the murder charge. That passage reads as follows:—

"That definition says that killing is murder if the act by which the death is caused is done:—

1. with the intention of causing death, or
2. with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is done, or
3. with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
4. with the knowledge that the act is so imminently dangerous that it might in all probability cause death or such bodily injury as is likely to cause death.

Thus, for a killing to amount to murder it has to be proved that the injury or injuries in consequence of which a human being died was or were inflicted with any one of these three intentions or knowledge which is the fourth element in the definition of murder. All that the definition requires is that there should be an intention to cause death or knowledge that death is likely to be the result.

You will see from the definition that intention is an important element in the offence of murder."

The learned counsel contended that the learned judge had failed to identify which overt act of the appellant constituted the requisite intention. In our view such direction is not necessary. We feel that the direction given by the learned judge is benevolent to the appellant.

The next ground was that the learned trial judge erred in his direction on the onus of proof placed on the accused when he said:—

"It is for you to decide whether you accept the prosecution witnesses' evidence and whether you consider them truthful witnesses or whether you accept accused's evidence."

This direction was made after the learned judge dealt with the appellant's evidence as to how the gun was fired. We agree that, read in isolation that passage would appear to request the assessors to resolve the conflicting evidence by deciding which evidence they believe when he should have directed them that the defence evidence should be accepted if they are left with a reasonable doubt as to its truth.

In this connection, we would like to refer to the judgment of the then Court of Appeal in the case of *Looi Wooi Saik v. Public Prosecutor*⁽¹⁾ where the court was considering the issue whether by reason of provocation the killing amounted to something less than murder. The question in that appeal was the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. At page 340 the court has this to say:—

A "In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation."

B This principle would equally apply to the case of a defence of accident under section 80. But we notice that earlier in his summing-up the learned judge directed the assessors in the following words:—

"Gentlemen, I have already mentioned to you that the burden is on the prosecution to satisfy you of the guilt of the accused beyond reasonable doubt and that burden is very heavy indeed.

C No such burden rests on the defence. All that the defence has to do is to raise a probability which will create a doubt in your mind as to the guilt of the accused.

D In other words, even if you are not convinced of the truth of the defence story, if you consider as reasonable and prudent men of the world that it is a probable story or that it is a reasonably true story which has created a doubt in your mind as to the prosecution case, then the defence can be said to have thrown a doubt on the prosecution case and you must then give the benefit of the doubt to accused."

E In our view this general direction given by the learned judge is another way of indicating to the assessors that in cases where the defence of accident is raised the burden is always on the prosecution to disprove the element of accident.

F Another ground of appeal was that in view of the handwriting expert's report the trial judge should have directed the assessors that it was not safe to rely on the confession contained in the cautioned statement (Exhibit P22) and this he omitted to do and thus occasioned a miscarriage of justice. It was defence case that the appellant never signed the cautioned statement. The written opinion of the handwriting expert was to the effect that there was insufficient evidence to prove that the signatures and dates on the cautioned statement and on the other documents were signed by the same person. Counsel therefore submitted that on that evidence the judge should have directed the assessors to give the benefit of a reasonable doubt as to whether the appellant signed the cautioned statement or not. With respect, we do not agree. If, as alleged, the appellant did not make or sign the statement that would mean that both ASP Foo and Cpl. Tuah were lying when they said that the appellant made the statement in their presence, and yet these two witnesses were never cross-examined on this point. In other words, the assessment of this question of whether the appellant had made such a statement would involve also the assessment of the evidence of those two police officers on that point. The appellant in his evidence said that he was so drunk that he was incapable of making or signing the statement. On the other hand, there was his evidence relating to the incident in the shop as to how he had accidentally shot the deceased. That evidence was so vivid that it does not seem reasonable to us that a few hours later and after a sleep he could be under the influence of liqueur and unable to remember what happened then. In the circumstances, it is reasonable to conclude that the assessors must have rejected the

defence story of incapacity. In our view this ground of appeal must be dismissed.

We would therefore dismiss the appeal and confirm the conviction and sentence.

Appeal dismissed.

**PUBLIC PROSECUTOR v.
CHUAN KEAT CHAN LTD.**

[F.C. (Ong C.J., Gill and Ong Hock Sim FJJ.) March 14, 1973]

[Ipoh — Federal Court Criminal Reference No. 5 of 1972]

Road Traffic — Failure to carry attendant at rear of vehicle — Condition of licence — Road Traffic Ordinance, 1958, ss. 119 and 120(2).

In this case the respondent had originally been convicted for a breach of a carrier's licence for not carrying an attendant in the rear of the vehicle. The appeal of the respondent was allowed by the High Court, ([1972] 2 M.L.J. 57). The Public Prosecutor thereupon referred the following question to the Federal Court: "Whether failure to comply with the following condition in a carrier's licence granted by the Road Transport Licensing Board constitutes an offence under section 120(2) of the Road Traffic Ordinance, 1958: 'An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic'."

Held, failure to comply with the condition constituted an offence under section 120(2) of the Road Traffic Ordinance.

FEDERAL COURT.

Gunn Chit Tuan (Senior Federal Counsel) for the appellant.

Respondent unrepresented.

Ong C.J.: On February 18, 1970 a motor-lorry operating under a "C" Carrier's Licence was observed by the Highway Patrol along the Ipoh-Kampar Road, without a lorry attendant as required under Condition 6 of the licence, which reads:—

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic."

The owner was charged for breach of this condition as an offence punishable under section 120(2) of the Road Traffic Ordinance 1958 and the driver for abetment of such offence. They were duly convicted in the Magistrate's Court at Kampar and fined the sum of \$40 and \$30 respectively. Their appeal was allowed by the judge of the High Court at Ipoh and on an application by the Public Prosecutor the following question was referred to the Federal Court as raising a question of law of public interest, namely —

"Whether failure to comply with the following condition in a Carrier's Licence granted by the Road Transport Licensing Board constitutes an offence under section 120(2) of the Road Traffic Ordinance 1958:

'An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic'."

As the High Court decision given on May 8, 1972 caused all prosecutions for similar alleged offences to

be held in abeyance throughout the country, we gave our decision, which was a reply in the affirmative, after hearing arguments on both sides, forthwith on January 29, 1973. We now state the grounds of our decision, which was unanimous.

Section 118(1) of the Ordinance empowers the Licensing Board in its discretion to grant or refuse an application for a haulage licence, or a variation of such licence or the conditions thereof. Sub-section (2) goes on to provide that the Board, in exercising its discretion under the section "shall have regard primarily to the interests of the public generally" — on which point the learned judge hearing the appeal said in his judgment:—

"Any condition in the licence which safeguards or secures the public interest is therefore within the ambit of the powers of the Licensing Board."

With this view we entirely agree. But then he went on to explain why he had to quash the conviction and gave the following reason:—

"I have been unable to find any law which requires an attendant to be carried on a goods vehicle. I asked both the learned deputy and the appellant's counsel if there in fact was a law which required an attendant to be carried on a goods vehicle and I have been assured that no written law exists to that effect in our country. The learned deputy, however, qualified his statement by saying that it is only by implication and by virtue of the condition imposed in the licence that an attendant is required on a goods vehicle. An attendant is a person who owes a duty of service to another or is one who attends, i.e., waits to serve. It appears that no rules have so far been made prescribing the duties of an attendant. It was a matter for the rule making authority to prescribe rules defining the duties of attendants on goods vehicles. As they do not seem to have thought it fit to make such rules, my duty is to interpret and enforce the law as it exists and not as it ought to be."

The failure of the Board to make rules prescribing the duties of attendants, in the view of the learned judge, had this legal effect:—

"The power vested in the licensing authority under section 119 to attach a condition to the licence is meant to serve the purpose of 'securing' as far as section 119(iv)(e) of the Road Traffic Ordinance is concerned, the safety and convenience of all road users. The condition has to be related to the purpose and if it is divorced from the purpose or is incapable in its context to serve the purpose for which alone the power to fasten a condition is conferred on the Licensing Board, the condition so imposed is outside the scope and ambit of the authority which the Legislature intended to confer on the Licensing Board and is to that extent invalid. In the absence of any legislation or rules prescribing the duties of attendants, condition No. 6 in the context in which it appears in the licence granted to the first appellant can in no way be said to promote or ensure public interest for the safety and convenience of those who try to overtake the goods vehicles."

With the greatest respect, we do not think that there is any *lacuna* in the law by reason of the Board making no rules governing attendants. Section 119 of the Ordinance provides for conditions which may be attached to licences and under paragraph (e) of sub-section (iv) thereof the Board was given express powers, in relation to all licences (which include the licence in the instant case) to attach conditions for securing that "the safety and convenience of passengers on vehicles and persons on roads shall be promoted." Condition 6, as is widely known, has been attached to haulage licences for many years in its present form. Clearly it was a practical safety measure aimed at